Supreme Court, U.S.
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No. 04 214

IN THE

Supreme Court of the United States

MARTIN GREENBLATT,

Petitioner,

- against -

DANIEL ORENBERG, JOHN SCHELLER, ROBERT W. GLUCK, ROBERT E. LUND SHERIFF OF SOMERSET COUNTY, THOMAS L. PRZBYLSKI, CATHERINE MOREY, PETER COSTANZO AUCTIONEERS INC., STANLEY W. HUDSON, JOSEPH SULOVSKI, SKI SETTING INC., JOHN DOE, JOHN DOE AND JANE DOE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Did the district Court have jurisdiction pursuant to Rule 41(a)(1) and or (2)?

2. Whether petitioner's Constitutional rights regarding selection of venue, been violated.

3. Whether the dismissal of the action ran afoul of the equal protection component of the due process clause of the Fifth Amendment to the Constitution

4. Did the District Court and the Third Circuit violate Petitioner's due process of law and equal protection of the law " guarantees under Amendment 14, Section 1 U.S. Constitution., by "usurping" Legislative powers.

5. Did the District Court with the Third Circuit in its affirmation violate Petitioners' "due process of law" and "equal protection of the law" guarantees under Amendment 14, section 1 U.S. Const. And article 1 Section 3 (equal rights) Article 13 Section 6 (open courts) Art. 1 Section 19 (due process) and Art. 1 Section 28 (no power of courts to suspend laws of state shall be exercised except by Legislature)

6. Does the affirmation of the dismissal with prejudice have a preclusionary effect on Petitioner's claim in New York State Court

7. Did the District Court violate substantive law by dismissing the entire action instead of splitting the action with the state court pursuant to Rule 1404

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to the proceeding

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In The
SUPREME COURT OF THE UNITED STATES

MARTIN GREENBLATT
Petitioner

v.

DANIEL ORENBERG, JOHN SCHELLER, ROBERT W.GLUCK,ROBERT E. LUND SHERIFF OF SOMERSET COUNTY,THOMAS L.PRZBYLSKI,CATHERINE MOREY,PETER COSTANZO AUCTIONEERS INC.STANLEY W. HUDSON,JOSEPH SULOVSKI,SKI SETTING INC. JOHN DOE,JOHN DOE and JANE DOE

On petition for a Writ of Certiorari To The
United States Court of Appeals
For the Third Circuit

PETITON FOR WRIT OF CERTIORARI

Petitioner, Martin Greenblatt, respectfully petitions for a writ of certiorari to review the judgement of the Court of appeals for the third Circuit in this case

OPINIONS BELOW

The Third Circuit opinion appears as Appendix A on page 1a, while the district court opinion appears as Appendix B on page 6a Neither opinion appears in an official reporter.

STATEMENT OF JURISDICTION

The Court of Appeals entered an order affirming the decision of the District Court on June 8, 2004 and this petition for a writ of certiorari is being filed within (90) days thereof. The case is final for purposes of review by this Court, because the affirmation, of the third Circuit of the District Court dismissal of this matter with prejudice, destroyed petitioners rights under the Constitution. The issue of finality is not whether the judgment is final on its face, but whether the Court adjudicated federal rights that they are not subject to further review in the state courts, and there are policy factors, that warrant Supreme Court review.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the 14th Amendment to the United States Constitution Section 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The Rules Enabling Act 28 U.S.C. section 2072 authorizes the Court to "prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts. Those Rules may not abridge, enlarge or modify any substantive right. In response, we have adopted the federal rules of Civil Procedure. Rule 1 governs their scope. It provides that these rules govern the procedure in the United States district courts in all suits of a civil nature

We observed that federal courts, in adopting rules, were not free to extend or restrict the jurisdiction conferred by a statute. Such a caveat applies a fortiori to any effort to

extend by rule the judicial power of the United States described in Article III of the Constitution. The Rules, then, must be deemed to apply only if their application will not impermissibly expand the judicial authority conferred by article III

28 U.S.C. section 1332 provides: (a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between (1) citizens of different states.

STATEMENT OF FACTS

The first action was filed in the District Court for the District of New Jersey on October 21, 2002 under docket No. CV-02-5065 (FSH). Shortly thereafter, one of the defendant's sent a defamatory letter to Petitioner and copied several others. Petitioner filed a libel action against the defendant. Both actions came before the same court. The District Court did not combine the two actions. However, it dismissed the second action without prejudice, for lack of subject matter jurisdiction, being that all the parties resided in the same State. Assuming that the dismissal was for both actions, Petitioner moved to New York establishing residency there near his office, filed another action in the District Court for the Southern District of New York, adding additional allegations of which the Writ of Error corum nobis was included.

The Sheriff defendants failed to timely answer the complaint, and Petitioner moved before the court for a default judgment.

The District Court for the Southern District for New York, instead of moving on petitioner's motion for a default

judgment, transferred the matter back to the District Court of New Jersey pursuant to Rule 1404.

Petitioner objecting to the transfer, filed a brief, and argued that a transfer of the entire case would have to be under two separate venue provisions, as required by law.

As the transfer was done rapidly, Petitioner was precluded from appealing the transfer, as Petitioner received a letter from the District Court, for the District of New Jersey, that it was moving on the matter. Petitioner moved before the Second Circuit for a Writ of Mandamus seeking the District Court for the District of New Jersey to remand the matter back to New York. However, the Second Circuit denied the application asserting that it did not have jurisdiction as the District Court for the District of New Jersey belonged to the Third Circuit.

Petitioner notified the District Court for the District of New Jersey, that another action was filed in the Supreme Court of New York, County of New York, and respectfully requested the matter before it be transferred and combined with the matter in the State court in New York, so that it would lessen its docket, as it is known that the federal courts are overloaded with cases.

The District Court for the District of New Jersey resisted Petitioners pleas and insisted that the matter be tried in his court.

This suit is based on the following issues: intent to defraud, fraud, conspiracy, misrepresentation, RICO and Writ of error corum nobis

PROCEEDINGS BELOW

The first suit was filed on October 21, 2002, in the U.S. District Court for the District of New Jersey, another matter was also filed in the U.S. District Court of New Jersey, and both actions came before the same judge. The second matter

was dismissed without prejudice, **for lack of subject matter jurisdiction, pursuant to 28 U.S.C. 1332**. Petitioner was advised to move the matter to state court. Petitioner, assumed that both actions were dismissed without prejudice, filed a similar action in the District court for the Southern District of New York, as he had become a resident of New York. Several of the defendants had defaulted, and Petitioner moved for a default judgment. However, the District Court for the Southern District of New York transferred the matter back to the district court of New Jersey, without moving on Petitioner's motion for default. On May 19, 2003, Petitioner filed a motion to vacate the order of the District Court, dated May 2, 2003, transferring this action to the District Court, District of New Jersey, seeking a remand of this action back to the District Court, Southern District of New York pursuant to 28 U.S.C.1404, Petitioner, moved before the Court, to withdraw the matter before the District Court District of New Jersey. And at the same time filed an action in Supreme Court of New York, County of New York. The District Court of New Jersey ordered Petitioner to withdraw the action before the Supreme Court of New York, County of New York, as it wanted to try the matter. Petitioner argued that since he moved the court to withdraw the matter, prior to a defendant's answer, the court was without jurisdiction. The District Court for the District of New Jersey, ignoring petitioner's pleading, dismissed the action with prejudice. Petitioner filed a timely appeal before the Circuit Court of Appeals for the Third Circuit and subsequently submitted a brief in support of his appeal. The Third Circuit affirmed the District Court's dismissal.

I

REASONS FOR GRANTING THE WRIT

The writ should be granted because the decision of the Court of Appeals for the Third Circuit: (1) conflicts with the decisions of other circuits and the Supreme Court on (a) the rules determining the existence of jurisdiction.(b) violation of Constitutional rights to a jury trial (c) violation of Constitutional right to choose the venue (d) equal protection under the law (e) due process of law.

II

THE QUESTIONS PRESENTED ARE IMPORTANT

The Constitutional guarantees of due process and the right to a jury trial present important issues. See e.g. Dimick v. Schiedt, 293 U.S. 474, 486, 55 S.Ct. 296, 301 (1935)("....of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care."). Here due process was not accorded, and the jury's fact finding function was improperly invaded by the District Court and the Third Circuit.

These infractions occurred in the decision of the Court of Appeals. This practice cannot go without redress by this Court without a serious dilution of the fundamental right of due process and a jury trial, and the Constitutional guarantees of open courts, equal protection of the law" guarantees under Amendment 14, section 1 U.S. Const. And article 1 Section 3 (equal rights)in Article 1 Section 13 (open courts) Art. 1 Section 19 (due process) and Art. 1 Section 28 (no power of courts to suspend laws of state shall be exercised except by Legislature)

ARGUMENT

The word "shall" in legislative laws has a clear mandatory connotation, and the court's rule-making power is exercisable only in a manner not inconsistent with the law of the state, and when a rule of court conflicts with a legislative enactment, the rule must yield Crickmer v. King 507 S.W. 2d 314 (Tex App.Texarkana 1974) and In Pistole v State, 150 S.W. 618 (Tex . Crim. App. 1912) Therefore, the Rules of Appellate Procedure as promulgated by the Supreme Court are subject to legislative veto. Thus when a rule conflicts with a statute the rule must fall. Southwest Metal Fabricators, Inc. v. International de Aceros, S.A., 503 F. Supp. 76 (D.C. Tex. 1980) and Few v Charter Oak Fire Ins. Co. 463 S.W. 2d 424

In the instant matter, 28 U.S.C. 1332 mandates jurisdictional issues regarding diversity of citizenship. The original complaint before Judge Hochberg had to be dismissed for lack of subject matter jurisdiction as all the parties were residing in New Jersey. Therefore, Rule 41 could not have applied, as the above law mandates it yield to Legislative enactment.

THE SPLIT IN THE CIRCUITS SHOULD BE RESOLVED

Petitioner, relied in his brief upon Gardner v. U.S 211 F 3, 1305, 1309 provides; three basic justification for dismissal because of attorney misconduct (1) prejudice to the other party (2) failure to alternative sanctions to mitigate the

severe burden that the misconduct has placed on the judicial system; and (3) deterrence of future misconduct in Shea v. Donohoe Constr. Co. 795 F 2d 1071 D.C. Circuit 1986 set forth "these justifications are not easily met. Prejudice for instance must be "so severe as to make it unfair to require the other to proceed with the case. The District Court did not identify any prior instance of misconduct on Mr. Gardner's part.....Nonetheless, given that this was Mr. Gardiner's only **"failure...to prosecute or comply with.. any order court" Fed. R. Civ. P. 41 (b) we find that the District Court abused its discretion in dismissing his case.**

In the instant matter the District Court did not identify any prior instance of misconduct on Petitioner's part as the record is silent in that regard. Furthermore, it was the transfer of the action from New York to New Jersey which precipitated Petitioner's move to withdraw the action, and for the Court to allege/imply/ assert that, Petitioner, willfully and intentionally seeks through maneuvering to avoid a resolution, is improper and appears to show prejudice towards this pro se litigant. Furthermore, if Judge Cote was so sure that Petitioner feared that Judge Hochberg was about to dismiss the action on the merits, why didn't Judge Cote allow the matter to be tried in her Court? Where she could have dismissed it, instead of clogging the docket of the District Court of New Jersey. Furthermore, the law set forth above, reveals that the D.C. Circuit, found a similar matter, where the District Court abused its discretion, as it failed to conform to the three basic justifications for dismissal. As here, the District Court together with Third Circuit, failed to address Gardner, as Petitioner had raised it in his brief. Therefore the District Court in dismissing the action with prejudice and failing to comply with the three basic requirements justifying the dismissal with prejudice abused its discretion.

The Ninth Circuit in Pedrina v. Chun 987 F 2d 608 agrees with the First, **Third** , Fifth and Eighths Circuit's that Rule 41(a)(1) allows a Plaintiff to dismiss without a court order any defendant who has yet to serve an answer or a motion of summary judgment. This view is endorsed by the principle treatises on civil procedure.....The sounder view and the weight of authority suggest that a plaintiff may use Rule 41(a)(1) to dismiss fewer than all of the named defendants..The better view holds that Rule 41 permits dismissal "whether it is fewer than all the defendants against whom the dismissal is sought to be taken, or fewer than all the plaintiffs who seek to withdraw from the action. Rule 41 (a)(1) is designed to permit a disengagement of the parties at the behest of the plaintiff...in the early stages of a suit, before the defendant has expended time and effort in the preparation of his case. See also American Cyanamid Co. v. McGhee 317 F 2d 295 (5th Cir. 1963) where the Fifth Circuit provided the law "The filing of notice itself closed the file. There is nothing defendant can do to fan the ashes of that action into life and the court has no role to play. This is a right running to the plaintiff and may not be extinguished or circumscribed by adversary or court. There is not even a perfunctory order of court closing the file. Its alpha and omega was the doing of the plaintiff alone. He suffers no impairment beyond his fees for filing. Because the district court has no authority to order plaintiff..."

The Sixth Circuit in D.C. Elects. V. Nartron Corp. 511 F2d 294 Set forth the law "other than to determine...whether an answer or motion for summary judgment has in fact been filed prior to the filing of a dismissal, a court has no function under Rule 41 (a)(1)(i) See also Moore's Federal Practice Paragraph 41.33[6][e], at 41-84 (3d ed 1999) Once a notice of dismissal without prejudice is filed, the court loses jurisdiction over the case,

and may not address the merits of the action or issue further orders' The plain language of Rule 41(a)(1)(i) as well as the strict construction courts have given the rule, **mandate the result we reach here.**

In this regard, the Third Circuit Court of Appeals stated that "Instead of filing a "notice of dismissal" before the defendants had filed answers to his complaint, Greenblatt filed a motion requesting an order from the District Court permitting him to withdraw the action without prejudice. He did not cite Rule 41(a)(1) or distinguish between those defendants who answered his complaint and those who had not. Under these circumstances, the District Court did not abuse its discretion in construing Greenblatt's filing as a request for dismissal pursuant to Rule 41(a)(2)"

While the attorney for the defendants, that defaulted failed to cite law, in opposition to petitioner's brief. The Third Circuit failed to address the law of the various circuits, raised by Petitioner in his brief.

This ruling should not be allowed to stand. As the first action (CV 02-5065 FSH), did not comply with 28 U.S.C. 1332 therefore it should have been dismissed for lack of subject matter jurisdiction, rendering Petitioner's first request to withdraw the action moot. Furthermore, in the New York Action before Judge Cote, there was a default, pending, against the Sheriff defendants' for failure to answer the complaint. The District Court was silent on this issue.

First, by dismissing the action with prejudice, violated petitioners, Constitutional guarantees of the equal protection under the law.

Second, the District Court should not be able to defeat a party's right to due process on an issue by, deliberately or unintentionally, declining to rule on an issue that has been properly presented, i.e. pending default and split into two cases as required by law.

Third: The District Court and the Court of Appeals for the Third Circuit were silent in its decision and affirmation of the decision, regarding the pending default against the Sheriff defendants.

Fourth, the Court of Appeals for the Third Circuit, in requiring petitioner's compliance as to the exactness of the rule, to effectuate his motion to withdraw, failed to consider that there was an outstanding default against the Sheriff defendants, appears to reveal partiality. Whereas, The District Court, together with the Circuit Court of Appeals for the Third Circuit remaining silent on that issue, is a clear violation of equal protection under the law.

Fifth, the Court of Appeals for the Third Circuit erred in its assertion that "instead of filing a "notice of dismissal" before the defendants had filed answers to his complaint, Greenblatt filed a motion requesting an order from the District Court permitting him to withdraw the action without prejudice. **He did not cite Rule 41(a)(1) or distinguish between those defendants who had answered his (App.4a) complaint and those who had not**. Under the circumstance, the District Court did not abuse its discretion in construing Greenblatt's filing as a request for dismissal pursuant to Rule 41(a)(2)". Is in conflict with Rules 7 and 8:

Federal Rules of Civ. Proc.**R.** 7 (1) Provides: An **application to the court for an order shall be by motion** which unless made during a hearing or trial, **shall be in writing, shall state with particularity the grounds**

therefor, and shall set forth relief or order sought. **The requirement of writing is fulfilled** if the motion is stated in a written notice of the hearing of the motion.

Rule 8 provides: (a) A pleading which sets forth a claim for relief.....shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it. **(2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.**

The record reflects that on July 28, 2003, Petitioner, in addition to the few letters to the District Judge, filed a motion to withdraw complaint bearing docket Number 03-2240 (JCL) pursuant to Rule 7 Federal Rules of Civil Procedure, and noticed, Robert Gluck Esq. and Anthony Palumbo Esq. Attached as appendix Pa 17 to the appeal to the Third Circuit. Petitioner believes that the motion was in compliance with the above rule. (The attorney for the Sheriff defendants were not noticed as they were in default).

Sixth, the District Court's erroneous assertion "Plaintiff has already withdrawn an identical action in this Court (the Judge Hochberg action) and that withdrawal was without prejudice. THE REASON FOR THAT WITHDRAWAL, ACCORDING TO JUDGE COTE , WAS THAT PLAINTIFF FEARED JUDGE HOCHBERG WAS ABOUT TO DISMISS THE ACTION ON THE MERITS. PLAINTIFF THEN CHOSE TO COMMENCE THIS SECOND IDENTICAL ACTION IN THE SOUTHERN DISTRICT OF NEW YORK, WHICH HAS BEEN TRANSFERRED HERE. PLAINTIFF NOW WISHES TO AVOID TRIAL HERE IN THIS COURT BY MOVING TO DISMISS THIS ACTION AND PROCEEDING WITH A THIRD ACTION IN NEW YORK STATE COURT. THE COURT THEREFORE BELIEVES THAT TO ALLOW

PLAINTIFF TO WITHDRAW HIS COMPLAINT WITHOUT PREJUDICE WOULD FRUSTRATE THE OBJECTIVES UNDERLYING THE RULE FOR VOLUNTARY DISMISSALS. THIS IS PARTICULARLY SO WHERE PLAINTIFF SEEKS, THROUGH MANEUVERING, TO AVOID RESOLUTION OF THIS DISPUTE INVOLVING NEW JERSEY DEFENDANTS ..." (Appendix 8a)

Had the District Court reviewed all the papers submitted, it would have realized that the matter before Judge Hochberg **had** to be dismissed for lack of federal matter jurisdiction pursuant to 28 U.S.C. 1332 as all the parties in the action resided in New Jersey, thereby rendering Petitioner's motion to withdraw the action before Judge Hochberg moot.

See Brown v Pyle 310 F 2d 95; 1962 App. Lexis3608: In order to invoke the jurisdiction of the federal courts, complainant must conform to the statutory requirements establishing such jurisdiction. Jurisdiction is not to be confused with venue. Jurisdiction is the power to hear and determine a cause – the power to adjudicate. The court below had this power in that there was a complete diversity of parties coupled with the necessary amount involved. Venue is the place where the power may be exercised in diversity cases. Venue is controlled by 28 U.S.C.A. section 1391 (a). It provides that 'a civil action wherein jurisdiction is founded only on diversity of citizenship may *** be brought only in the judicial district where all plaintiffs or all defendants reside.'.....In many respects our federal system is an independent system established for the benefit of litigants who could not otherwise avail themselves of a state court. It is also a court system of limited and well-defined jurisdiction with the place of trial prescribed to carry out policies, which Congress regards as important for a national system.

The Supreme Court in Owen Equipment & Erection Co. v. Kroger 437 U.S. 365; 98 S.Ct. 2396;57 L Ed 2d 274; 1978 U.S. Lexis 114; 25 Fed. R. Serv. 2d (Callaghan) 554. Provides: n10 Constitutional power is merely the first hurdle that must be overcome in determining that a federal court has jurisdiction over a particular controversy. For the jurisdiction of federal courts is limited not only by the provisions of art. III of the Constitution, but also by Acts of Congress. Palmore v. United States, 411 U.S. 389, 401 Lockerty v. Philips, 319 U.S 182, 187 Kline v Burke Constr. Co. 260 U.S 226, 234; Cary v. Curtis , 3 How. 236, 245
The relevant statute in this case, 28 U.S.C. section 1332(a)(1), confers upon federal courts jurisdiction over "civil actions where the matter in controversy exceeds the sum or value of $10,000... and is between ...citizens of different States." This statute and its predecessors have consistently been held to require complete diversity of jurisdiction. N 13. That is diversity jurisdiction does not exist unless each defendant is a citizen of a different State from each plaintiff. Over the years Congress has repeatedly re-enacted or amended the statute conferring diversity jurisdiction, leaving this rule intact this rule of complete diversity. N 14 Whatever may have been the original purposes of diversity-of-citizenship jurisdiction n 15 this subsequent history[**2403] clearly demonstrates a congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State of any defendant Cf. Snyder v. Harris, 394 U.S 332, 338-339. N16

The Courts' assertion that Petitioner was maneuvering was inappropriate, as the District Court prejudged the matter. In fact Petitioner's reply brief before the Third Circuit addressed the issue "Plaintiff as a resident of New York filed the matter in New York. **Plaintiff was**

prepared to try the matter in New York, and for defendants to assert that Plaintiff is abusing the system is inappropriate and improper.

Page 2 of the District Court's opinion "This two dismissal rule...was intended to prevent delays and harassment by Plaintiff securing numerous dismissal without prejudice...Although the two dismissal Rule by its terms does not apply where as here, the second dismissal is by order of the District Court under Rule 41(a)(2) underlying rational for the Rule-to prevent undue delay and harassment is fully applicable to the present circumstances"

The Court rules afford discretion to the Judge. However, Petitioner believes that his letter of November 10, 2003, in which Petitioner asserted that, "these defendants, are strenuously attempting to have the above entitled action tried in New Jersey.....While the record reflects , that these defendants have a friend in the New Jersey Courts, as is indicated in an excerpt of a trial transcript attached. Petitioner, Citing Code of Judicial Conduct....**A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary**" may have irked the District Court, that is why the court came down hard on Petitioner. However, that is no reason for Petitioner's Constitutional rights to be violated. As it has been violated since 1984, where the, "court issued a directed verdict in a contract matter, disallowing factual issues to be given to a jury". Subsequently, Petitioner moved by way of motion on or about the year 2001, before the same court, under Writ of Error Corum Nobis, the application was dismissed, on the grounds that, writ of error corum nobis is not applicable in New Jersey. It was the same court which, is on the record, as being a friend of Petitioner's adversaries.

The 14th Amendment to the Constitution mandates that: No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States;

See, Orleans Parish School Bd. V. Bush C.A. La 1957 242 F 2d 156 Cert. Denied 77 S. Ct. 1380, 354 U.S. 921, L Ed 2d 1436.The adoption of this amendment implied that there are matters of fundamental justice that the citizens consider so essential an ingredient of human rights as to require restraints on action on behalf of any state that appears to ignore them.

See, Hosey v. Club Van Cortland, D.C.N.Y. 1969, 299 F Supp. 501 Judicial action in private disputes is a form of state action required for application of this clause prohibiting state from abridging the privileges and immunities of citizens

Chicago Burlington and Quincy Railroad Company v. Chicago No 129 Supreme Court of the United States 166 U.S. 226; 17 S. Ct. 581; 41 L Ed 979; 1897 U.S. Lexis 2019

"At 8" "The true and rationale rule" this court said in Bridge Proprietors v. Hoboken Co. 1 Wall. 116, 143, "is that the court must be able to see clearly from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed be him was denied" In Roby v. Colehour, 146 U.S. 153, 159, it was said that our jurisdiction being invoked upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed , it must appear from the record of the case either that the right so set up and claimed was expressly denied, or that such was the necessary effect in law of the judgment De Saussure v Gailard 127 U.S. 216, 234, Brown v Atwell, 92 U.S. 327 "at 9"

A State may not, by any of its agencies disregard the prohibitions of the Fourteenth Amendment. Its judicial

authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: Can a State make anything due process of law which by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation. "Davidson v. New Orleans 96 U.S. 97, 102. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law....." "at 10" Such an enactment would not receive judicial sanction in any country having a written constitution distributing powers of government among three coordinate departments and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated not as an exertion of legislative power, but as sentence – an act of spoliation. Due protection of rights of property has been regarded as a vital principle of republican institutions....."The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. ..... In his work on Constitutional Limitations, Mr. Cooley says: The principles, then upon which the process is based are to determine

whether it is due process or not, and not any considerations of mere form…when the government, through its established agencies, interferes with the title to ones property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test the validity by those principles of civil liberty and constitutional forms of procedure merely in judicial proceedings the law of the land requires a hearing before condemnation and judgment before dispossession;……."at 12" **Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of case to which the one in question belongs**……."at 14 the court observing that a trial by jury was a constitutional right of which the party may not be debarred either by the action or non-action of the legislature People v. McRoberts 62 Illinois 38

In the instant matter, Petitioner sought to invoke his Constitutional right of choice of venue. This was thwarted by the transfer by Judge Cote to the District Court for the District of New Jersey. Petitioner further sought to correct an injustice perpetrated upon him, by invoking the Writ of Error corum nobis, which does not exist in New Jersey. Again, Petitioner was thwarted by the transfer of the action to the District Court of New Jersey. And the further insistence of the District Court of New Jersey to try the matter even though it has an overloaded docket of cases, punished Petitioner, by dismissing the matter with prejudice instead of complying with the conduct of Judicial Ethics raised by Petitioner.

Accordingly, the District Court failed to comply with Due process of law requirement in this particular case, and such an exertion of the powers of government has violated petitioner's Constitutional rights of due process and equal

protection. Furthermore, it is contrary to the settled maxims of law which permit and sanction And under such safeguards for the protection of individual rights as those maxims prescribe for the class of case to which this one in question belongs. Therefore, the District Court abused its discretion by dismissing the action with prejudice.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted

Respectfully Submitted.

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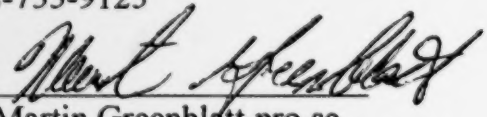
By: 
Martin Greenblatt pro se

Dated: August 10, 2004

APPENDIX A OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
Dated June 8, 2004

UNREPORTED-NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 03-4873

MARTIN GREENBLATT
Appellant
v.

DANIEL ORENBERG;JOHN SCHELLER
ROBERT W. GLUCK; ROBERT E. LUND
THOMAS L. PRZBYLSKI; CATHERINE C. MOREY;
PETER COSTANZO AUCTIONEERS INC.;
STANLEY W. HUDSON;
JOSEPH SULOVSKI;SKI SETTING INC.;
JANE DOE; JOHN DOE

On appeal from the United States District Court
For the District of New Jersey
(D.N.J. No. 03-cv-02240)
District Judge: Honorable John C. Lifland

Submitted under Third Circuit LAR 34.1 (a)
June 7, 2004

Before: SLOVITER, NYGAARD AND CHERTOFF, Circuit Judges.

Filed June 8, 2004

OPINION

PER CURIAM

Martin Greenblatt appeals the District Court's dismissal of his action to recover damages for alleged fraud and violations of the Racketeer Influenced and Corrupt Organizations Act 18 U.S.C. sections 1961-68 ["RICO]. We will affirm.

I

Because we write only for the parties, we briefly summarize the relevant procedural history. Greenblatt filed a complaint in October 2002 in the United States District Court for the District of New Jersey. He filed a second, virtually identical complaint in the United States District Court for the Southern District of New York in January 2003. After the defendants had answered his complaint in the District of New Jersey, Greenblatt filed a motion to voluntarily withdraw that action; the District Court granted his motion in February 2003 and dismissed the action without prejudice under FED. R. CIV. P.41 1 The District Court for the Southern District of New York transferred

1The District Court initially entered an order on February 24, 2003 dismissing the action without prejudice after noting that "counsel have reported to the Court their consent to a voluntary dismissal." The District Court inexplicably entered a second order on February 27, 2003 dismissing the action without prejudice "pursuant to Rule 41(b)," noting "plaintiff's request for a voluntary dismissal" and that the Court received "no objection by any Defendant."

Because no formal stipulation of dismissal appears on the docket, we understand that the District Court to have dismissed the action under Rule 419a)(2). See Orsini v. Kugel, 9 F3d 1042, 1045 (2d Cir. 1993) (holding that Rule 41(a)(1) stipulation must be filed to effectuate voluntary dismissal

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Greenblatt's second complaint to the District Court of New Jersey in May 2003 –2- that action is the subject of this appeal. Greenblatt filed a third complaint raising the same claims against the same defendants in a New York State court. In July 2003, after some of the defendants had answered the complaint without prejudice in the District of New Jersey, Greenblatt filed a motion to withdraw that complaint without prejudice because of the pending New York state court action. the District Court concluded that Greenblatt ultimately sought to delay adjudication of his claims, and on November 25, 2003, it entered an order stating that the complaint would be dismissed with prejudice under Rule 41(a) (2) on December 20, 2003 unless Greenblatt withdrew the complaint that was pending in New York state court and withdrew his motion to withdraw his complaint in the District Court. Greenblatt appealed that order on December 29, 2003.

II.

We have appellate jurisdiction pursuant to 28 U.S.C. Section 1291 because Greenblatt timely appealed the District Court's November 2003 order after it became final on December 20, 2003. We review a district court's voluntary dismissal under Rule 41(a)(2) for abuse of discretion. See Sinclair v. Soniform, Inc. 935 F 2d 599, 603 (3d Cir. 1991).

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2. Greenblatt unsuccessfully sought a writ of mandamus from the United States Court of Appeals for the Second Circuit directing the District Court for the District of

New Jersey **to dismiss this action**. See In re Martin Greenblatt No 03-3116 (2d Cir. Mar. 11, 2204)

III

Greenblatt argues on appeal that the District Court should have dismissed his action without prejudice pursuant to Rule 41(a)(1), and not with prejudice pursuant to Rule 41(a)(2), because defendants Lund, Morey and Przbylski had not answered his complaint when he filed his motion to dismiss. We note initially that if Greenblatt's assertion were correct, the "two-dismissal "rule of Rule 41(a)(1) would not transform his notice into an adjudication on the merits because he obtained his prior dismissal by order of the District Court under Rule Rule 41 (a)(2). See Sutton Place Dev. Co. v. Abacus Mortg. Inv. Co. 826 F2d 637, 640-41 (7th Cir. 1987) (holding that Rule 41 (a)(1) does not apply to dismissals by court order).

We are not persuaded that the District Court abused its discretion. Rule 41(a)(1) permits a plaintiff to dismiss an action without prejudice and without a court order by filing a notice of dismissal "at any time before service by an adverse party of an answer or motion for summary judgment..." See FED R. CIV P. 41 (a)(1) A timely notice of voluntary dismissal bars dismissal with prejudice and deprives the court of jurisdiction over the dismissed claims. See Manze v State Farm Ins. Co. 817 F 2d 1062, 1066 (3d Cir. 1987); See also Janssen v, Harris, 321 F3d 998, 1000 (10th Cir.). Instead of filing a "notice of dismissal " before the defendants had filed answers to his complaint, Greenblatt filed a motion requesting an order from the District Court permitting him to withdraw the action without prejudice. He did not cite Rule 41(a)(1) or distinguish between those defendants who had answered his complaint and those who had not. Under these

circumstances, the District Court did not abuse its discretion in construing Greenblatt's filing as a request pursuant to Rule 41(a)(2).

A district court may convert a dismissal sought to be entered without prejudice. See United States v. 266 Tonawonda Trail, 95 F3d 422, 425 (6th Cir. 1996) See also Gravatt v Columbia Univ. 845 F2d 54, 56 (2d Cir. 1988) We consider three factors in determining the propriety of the District Court's dismissal with prejudice in response to Greenblatt's request for a dismissal without prejudice: 1) whether the plaintiff had notice of the district court's intention to dismiss with prejudice; 2) whether the plaintiff had an opportunity to be heard in opposition to a dismissal with prejudice; and 3) whether the plaintiff had an opportunity to withdraw the request for voluntary dismissal and proceed with the litigation. See Tonawanda Trail, 95 F 3d at 425. The District Court's November 25, 2003 order clearly notified Greenblatt of its intention to dismiss with prejudice and provided him one month in which to either respond in opposition or withdraw his request for dismissal. Moreover, we agree with the rationale underlying the District Court's decision to dismiss Greenblatt's remaining claims with prejudice. See United States ex rel. Stone v. Rockwell Intern Corp. 282 F 3d 787, 810 (10th Cir. 2002) (stating that plaintiff may voluntarily dismiss his action under Rule 41(a)(2) "so long as the defendant is not hurt"). Accordingly, the District Court did not abuse its discretion in dismissing Greenblatt's complaint with prejudice.

IV.

For the foregoing reasons, we will affirm the judgement of the District Court.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARTIN GREENBLATT Plaintiff, Vs. DANIEL ORENBERG, ET AL., Defendants	CIVIL ACTION NO.03-2240(JCL) MEMORANDUM AND ORDER

LIFLAND, District Judge

Presently before the Court is a motion by plaintiff Martin Greenblatt to withdraw his complaint and voluntarily dismiss this action without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2). Defendant Daniel Orenberg , john Scheller,Robert Gluck, Robert Lund, Thomas Przbylski, Katherine Morey, Peter Costanzo Auctioneers, Inc. Stanley Hudson, Joseph Sulovski Ski Setting Inc. Jane Doe and John Doe ("defendants") oppose Plaintiff's motion. Because Plaintiff has previously dismissed an action in this Court based on the same causes of action, the Court believes that proper resolution of this matter requires a review of the relevant procedural history. On October 21, 2002, Plaintiff filed an action in this Court (" the Judge Hochberg action") seeking damages allegedly sustained as a result of a seizure of certain jewelry pursuant to a writ of execution authorizing the Sheriff of Somerset County to levy upon Plaintiff's assets. Plaintiff thereafter filed a notice of motion to withdraw the complaint, and on

February 26, 2003, Judge Hochberg entered an order dismissing the complaint without prejudice. Defendants have represented to the Court that this order was entered over objections by defense counsel. Plaintiff then filed the present action in the United States District Court for the Southern District of New York, asserting the same claims. This action was assigned to the Honorable Denise Cote U.S.D.J.., who transferred the action to this Court after noting that the Judge Hochberg action had been previously filed in New Jersey and the subject matter of the instant action had a greater nexus to New Jersey than new York. Plaintiff's subsequent motion to vacate the transfer order was denied by Judge Cote.

Plaintiff now moves to voluntarily dismiss this action without prejudice. Moreover, Plaintiff has filed a third action in the Supreme Court of the State of New York based on the same claims. All defendants in the New York action are alleged by Plaintiff to be residents of, or having offices in, New Jersey Only Plaintiff is a New York resident

The Federal Rules of Civil Procedure permit voluntary dismissal after an answer or motion for summary judgment by an adverse party only by stipulation or court order. See Fed. R.Civ. P. 41(a). The dismissal may be with or without prejudice and "upon such terms and conditions as the court deems proper." Id. Pursuant to federal Rules of Civil Procedure 41(a)(1) a dismissal by a plaintiff who had previously has dismissed an action, in any state or federal court, based on or including the same claim, operates as an adjudication on the merits. "This two dismissal' rule...was intended to prevent delays and harassment by plaintiffs securing numerous dismissals without prejudice." 9 Charles Alan Wright, et as., federal Practice and Procedure section 2368 (2d ed. 1997). Although the "two dismissal" rule, by its terms, does not apply where, as here, the second

dismissal is by order of the district court under Rule 41(a)(2), the underlying rationale for the rule-to prevent undue delay and harassment-is fully applicable to the present circumstances.

Plaintiff's procedural maneuvering is delaying an ultimate resolution on the merits, thus causing defendants to expend unnecessary funds in defending these various actions. Plaintiff has already withdrawn an identical action in this Court (the Judge Hochberg action) and that withdrawal was without prejudice. The reason for that withdrawal, according to Judge Cote, was that Plaintiff feared that Judge Hochberg was about to dismiss the action on the merits. Plaintiff then chose to commence this second identical action in the Southern District of New York, which has been transferred here. Plaintiff now wishes to avoid trial in this Court by moving to dismiss this action and proceeding with a third action in New York State court. The Court therefore believes that to allow Plaintiff to withdraw his complaint without prejudice would frustrate the objectives underlying the rule for voluntary dismissals. This is particularly so where Plaintiff seeks through his maneuvering, to avoid resolution of this dispute involving New Jersey defendants in a forum which both Judge Cote and this Court feel to be appropriate, and to pursue its resolution in the Supreme Court of the State of New York and the subject matter of the action.

The Court has discretion pursuant to federal Rules of Civil Procedure 41(a)(2) to dismiss this action with prejudice, 9 Charles Alan Wright, et al., federal Practice and procedure section 2367 (2d ed 1997) ("[I]f the plaintiff...moves for dismissal without prejudice...the matter is left to the discretion of the court. The court may grant dismissal without prejudice or may require that the dismissal be with prejudice."). Only because dismissal with prejudice would operate as an adjudication on the merits, which have

never been addressed, the Court will afford Plaintiff the opportunity to withdraw both this motion and the complaint currently pending in New York state court, and proceed with the present matter in this Court. Otherwise, this action will be dismissed with prejudice.

Accordingly. **IT IS** on this 20th day of November 2003 **ORDERED** that Plaintiff's complaint in this matter will be dismissed WITH PREJUDICE in December 20, 2003, unless by then Plaintiff has voluntarily withdrawn both the present motion and his complaint currently pending in the Supreme Court of the State of New York (Index No. 03113240) and thus proceeds with the present matter in this Court

_____

John C. Lifland
United States District Judge

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT 14
SECTION 1 *** No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ****nor deny to any person within its jurisdiction the equal protection of the laws

UNITED STATES CONSTITUTION, AMENDMENT VII
In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved…

28 U.S.C. Sec. 1254
Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari upon the petition of any party to any civil or criminal case, before a rendition of judgment or decree….

Fed. R. Civ P. Rule 7 (1) An application to the court for an order shall be by motion which unless made during a hearing or trial, shall be in writing, shall state with particularity the grounds thereof, and shall set forth relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Fed. R. Civ P. Rule Rule 8 (a) A pleading which sets forth a claim for relief….shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it (2) a short and plain statement of the claim showing that the pleader is

entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

28 U.S.C. section 1332(a)(1), confers upon federal courts jurisdiction over "civil actions where the matter in controversy exceeds the sum or value of $10,000... and is between ...citizens of different States." This statute and its predecessors have consistently been held to require complete diversity of jurisdiction..... That is diversity jurisdiction does not exist unless each defendant is a citizen of a different State from plaintiff.

Fed. R. Civ P. Rule 41(a)(1) By plaintiff: by stipulation. Subject to the provisions of Rule 23(e) of Rule 66, and of any statute of the United States an action may be dismissed by the plaintiff without a court order (i) by filing a notice of dismissal at any time before service by the adverse party...(2) By order of the Court .....(b) Involuntary dismissal: effect thereof....(c) Dismissal of counterclaim, cross-claim or third party claim...Costs of previously – dismissed action